UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INDIANA BELL TELEPHONE COMPANY, INC. **Respondent,** **and** **COMMUNICATIONS WORKERS OF AMERICA, LOCAL 4900** **Charging Party.**	**Case No. 25-CA-218494**

COMMUNICATIONS WORKERS OF AMERICA, LOCAL 4900 ANSWERING BRIEF IN RESPONSE TO RESPONDENT'S EXCEPTIONS AND BRIEF IN SUPPORT

Pursuant to Section §102.46(b) of the Board's Rules and Regulations, Communications Workers of America, Local 4900 (hereinafter "Union" or "CWA Local 4900") hereby submits its Answering Brief in response to the Exceptions to the Administrative Law Judge's Decision filed by Respondent in the above-captioned case. The Local respectfully urges the Board to adopt the decision of the ALJ in the above-captioned case without exception.

Date: October 28, 2019

Respectfully submitted,

s/ *Matthew R. Harris*

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I. PROCEDURAL BACKGROUND

On September 17, 2019, Administrative Law Judge ("ALJ") Michael A. Rosas issued his decision in the above captioned case, concluding Respondent violated Section 8(a)(1) of the Act by "maintaining a rule since April 8, 2016 banning premises technicians from wearing a union button stating 'CWA' and discriminatorily enforcing that ban on April 16, 2018." (ALJ D. p. 11) On September 17, 2019, the case was transferred to the Board.

On October 15, 2019, Respondent filed Exceptions and a Brief, arguing the ALJ erred by: (1) concluding the Company's personal appearance policy violates the Act; (2) concluding the Union did not waive its rights to bargain over the Premises Technicians' right to wear union insignia; (3) concluding the Company discriminatorily enforced its appearance standards; and (4) failing to apply the collateral estoppel doctrine.

CWA Local 4900 hereby submits its Answering Brief in response to Respondent's Exceptions to the ALJ's Decision.

II. FACTS

The Union hereby incorporates the facts of the case as set forth in the ALJ's decision. A brief summary of the pertinent facts follows:

The Respondent's 2016 Personal Appearance Policy ("Policy") at issue provides:

PERSONAL APPEARANCE

> 14.1 The intent of the Branded Apparel Program (BAP) and the requirements of a technician's personal appearance are to ensure that AT&T technicians project and deliver a professional, business-like image to our customers and community.
>
> 14.2 BAP is mandatory for all SD&A Premises & Wire Technicians on work time. No other shirt, hat, pants/shorts, shorts or jacket will be worn without management approval. Shirts must be tucked into the technician's pants/shorts at all times. Technicians must

wear a belt, threaded through the pant/short belt loops. Pants/shorts must be worn around the waist with no undergarments showing.

14.3 The branded apparel may not be altered in any way.

(GC Ex. 6; R. Ex. 2) This Policy, announced on or about April 8, 2016, amended a prior version, which provided in pertinent part, "The branded apparel may not be altered in any way which includes adding buttons, pins, stickers, writing etc." (*See* R. Brief p. 5)

Under all versions of the Policy, CWA Local 4900 had historically distributed buttons to employees, who in turn wore and displayed them in the presence of managers without incident. (TR 122-24) In early 2018, in conjunction with collective bargaining over a successor contract, the Union distributed two types of red buttons. One button was the size of the bottom of a soda can and said, "Fighting Today, Focused on the Future" and it was attached to a lanyard. The other button was quarter-sized and stated, "We Demand Good Jobs." (GC Exs. 13(a)-(b), 15) These buttons were worn and displayed by numerous employees, including Premises Technicians.

However, on April 16, 2018, in conjunction with collective bargaining negotiations, employees were suddenly prohibited from wearing the CWA buttons and were threatened with discipline if they did wear them. In one specific incident, a premises technician surnamed Terry was observed wearing a CWA button on his Company shirt. He was told to remove it and notified any refusal could subject him to discipline including termination. Terry brought the issue to the attention of Union area representative Danny Collum ("Collum"). When Collum questioned Company manager Joseph St. Clair ("St. Clair") about the issue, St. Clair attributed the Company's enforcement to a directive from the Company's bargaining team, ostensibly in response to Union mobilization activities. (TR 67)

III. AUTHORITY AND ARGUMENT

A. Standard of Review

A trial examiner's findings of fact are reviewed by the Board *de novo*. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, 545, enfd. 188 F.2d 362 (3rd Cir. 1951). However, the Board will not overrule an ALJ's credibility resolutions "except where the clear preponderance of *all* the relevant evidence convinces [the Board] that the Trial Examiner's resolution was incorrect." (emphasis original) *Id*.

B. The ALJ Did Not Err In Concluding the Respondent's "Personal Appearance Rule" Violated the Act Insofar As the Rule Was Used Improperly to Prohibit Premises Technicians from Wearing Uncontroversial Union Buttons.

1. *Respondent Failed to Demonstrate Special Circumstances Justifying Its Ban of Union Buttons.*

Respondent agrees that the Supreme Court's decision in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945) is controlling. (R. Brief. p. 13) As has been pointed out by both Respondent and the ALJ, pursuant to the Court's decision in *Republic Aviation*, the Board must balance employees' Section 7 right to wear union insignia in the workplace against an employer's ability to narrowly curtail such right if it can demonstrate that special circumstances so warrant (e.g. safety concerns, production concerns etc.). *Id.* "[C]ustomer exposure to union insignia alone is not a special circumstance which permits an employer to prohibit display of union insignia by employees." *Meijer, Inc.*, 318 NLRB 50, 50 (1995), enfd. 130 F.3d 1209 (6th Cir. 1997); *Nordstrom, Inc.*, 264 NLRB 698, 700 (1982).

In its Brief Respondent asserts that "special circumstances" justify its prohibition regarding Premises Technicians' display of union insignia in the form of a button. The "special circumstances" cited are that the insignia unreasonably interferes "with a public image that an employer has established" and its "need to create a positive customer experience." (R. Brief pp.

13-14) As the ALJ has already noted, however, this argument is inherently contradictory because the Respondent already supplies and permits its employees to wear a hat that bears both CWA and Company logos. (ALJ D. p. 8) Further, the Supreme Court addressed a nearly identical argument raised in *Republic Aviation* and cited, with approval, the Board's analytical framework:

> We do not believe that the wearing of a steward button is a representation that the employer either approves or recognizes the union in question as the representative of the employees, especially when, as here, there is no competing labor organization in the plant. Furthermore, there is no evidence in the record herein that the respondent's employees so understood the steward buttons or that the appearance of union stewards in the plant affected the normal operation of the respondent's grievance procedure. ***On the other hand, the right of employees to wear union insignia at work has long been recognized as a reasonable and legitimate form of union activity, and the respondent's curtailment of that right is clearly violative of the Act.*** (emphasis added)

324 U.S. at 802-03, fn.7. Finally, Respondent's "special circumstances" argument has been consistently rejected by the Board. *See, e.g., Meijer*, *supra*.

Hence, Respondent's attempt to argue that "special circumstances" justify its prohibition of Premises Technicians' donning uncontroversial buttons bearing union slogans and/or insignia is unavailing.

2. *The ALJ Correctly Concluded that Respondent Enforced the Policy in Response to Employees' Section 7 Activities During Collective Bargaining.*

Simultaneously, and somewhat contradictory to its position that the Union's logo somehow interferes with Respondent's "need to create a positive customer experience," Respondent also argues that the provision of its union-branded hat evidences non-discriminatory intent in enforcing the Policy at issue. The manifest weight of the evidence contravenes this position: the record is replete with evidence that the Respondent *only* enforced the Policy on April 16, 2018, as a means to quell the Union's Section 7 mobilization activities in the context of bargaining. (TR 30, 32, 34, 37, 40, 51, 67, 68, 124) Further, an employer is not permitted to

unlawfully proscribe expressions of protest and/or expressions of support for a union protected by Section 7 merely because the employer has allowed instances of such conduct in the past. More affirmatively, Respondent is not permitted to enforce its Policy so to unreasonably interfere with its employees' right to don union insignia merely because Respondent distributes a hat bearing a union logo. In sum, Respondent is not privileged to decide how employees demonstrate their support for the union.

Further, the GC demonstrated the following: (1) Historically, in 2009, 2012 and 2015, Premises Technicians wore union buttons on branded apparel to show solidarity during the bargaining process[1]. (TR 30, 32, 34, 102-05, 117, 122-24) (2) The foregoing conduct occurred without incident. (*Id*.) (3) In 2018, for the first time, the Company's "bargaining team," presumably concerned about employees' mobilization efforts during bargaining, sought enforcement of the Policy (vis-à-vis the labor relations department) in response to protected concerted activities of employees, including Premises Technicians[2].

The ALJ correctly concluded, on this record, that:

> Similar buttons had been worn by premises technicians over the previous nine years during similar activities and, in contrast to tee shirts, supervisors never ordered them to remove their buttons. ***On April 16, however, the Company's labor relations department encroached upon its operations by directing supervisors to do so just as the Union began mobilizing members for contract negotiations***.
> * * *

[1] As the ALJ correctly concluded, "Prior to April 2018, the Company did not enforce the pre-2016 guidelines or 2016 guidelines to ban union buttons, much less discipline any employee for violating those rules." (ALJ D. p. 5, fn.13)

[2] Respondent claims there is scant evidence that Premises Technicians, as opposed to "employees" in the generic sense, actually wore the buttons. First, the record is clear that the buttons were distributed to Premises Technicians and managers observed Premises Technicians wearing the buttons at issue on April 16, 2018. (TR 30-37, 40-42, 55-56, 67-68, 117, 124) Second, Respondent admits throughout its Brief that the Policy is only enforceable as against Premises Technicians and that enforcement was only sought as against Premises Technicians. (R. Brief p. 6) Hence, if Premises Technicians were not observed wearing the buttons on April 16, 2018, there would have been no occasion to enforce the Policy and the instant litigation would not have resulted.

> Employees wore buttons frequently throughout bargaining sessions in 2009, 2012, and 2015, within sight of supervisors and without restraint. On April 16, however, a Company supervisor enforced the 2016 guidelines at the direction of the Company's labor relations team. ***That backdrop clearly entwined the action with the collective-bargaining process.*** (emphasis added)

(ALJ D. p. 10) The ALJ reached the correct conclusion that the Policy was maintained and enforced in manners that violated the Act.

C. The ALJ Properly Concluded the Union Did Not Waive its Right to Bargain Over the Premises Technicians' Right to Wear Union Insignia.

Respondent argues that (1) the ALJ failed to apply the appropriate waiver standard in light of the Board's ruling in *MV Transportation, Inc*., 368 NLRB No. 66, slip op. *1 (2019)[3], and (2) the ALJ erroneously concluded the parties' conduct since April 2016--when the Respondent implemented the policy at issue--did not support a finding of waiver.

1. *The ALJ Applied the Correct Waiver Standard.*

In *MV Transportation*, the Majority addressed whether "a 'clear and unmistakable waiver' standard should apply when considering whether an employer's unilateral action is permitted by a collective bargaining agreement." *Id*. at *1. In analyzing such situations, the Majority abandoned the "clear and unmistakable waiver" standard and adopted the following "contract coverage standard:"

> Under contract coverage, the Board will examine the plain language of the collective-bargaining agreement to determine whether action taken by an employer was within the compass or scope of contractual language granting the employer the right to act unilaterally . . . On the other hand, if the agreement does not cover the employer's disputed act, and that act has materially, substantially and significantly changed a term or condition of employment constituting a mandatory subject of bargaining, the employer will have violated [the Act] unless it demonstrates that the union clearly and unmistakably waived its right to bargain over the change or that its unilateral action was privileged for some other reason.

[3] For the reasons highlighted in Member McFerran's dissenting opinion, the Union contends that *M.V. Transportation* was wrongly decided and should be overturned by the Board.

Id. at *2. The Majority went on to state (as the ALJ pointed out in his decision at footnote 22), "…We will apply the contract coverage standard in this case and in all pending *unilateral-change* cases where the determination of whether the employer violated Section 8(a)(5) turns on whether contractual language granted the employer the right to make the change in dispute." (emphasis added) *Id*.

The instant matter does not "turn" on whether the CBA granted Respondent the right to make a unilateral change to the Policy. The matter does, however, turn on whether the Respondent maintained and *enforced* a rule so to interfere with Section 7 rights. Hence, the Board's decision in *MV Transportation* is inapplicable. Further, the ALJ acknowledged that even if, *arguendo*, the CBA language did permit changes to the Policy and even if the Union waived its right to bargain over the Policy, the Respondent nevertheless enforced the Policy in an unlawful manner. (ALJ D. p. 10)

2. *The Contract Coverage Standard Does Not Apply to an Alleged Contractual Waiver of Section 7 Rights.*

To the extent an alleged contractual "waiver" is involved in this case, the alleged waiver exclusively involves a statutorily protected right, i.e., employees' Section 7 right to wear union insignia in the workplace. In this respect, the Supreme Court has explicitly foreclosed the application of the "contract coverage standard" insofar as it relates to a union's alleged contractual waiver of statutorily protected collective employee rights: "***[W]e will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.' More succinctly, the waiver must be clear and unmistakable.***" (emphasis added) *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).

Finally, Appendix F, Section 5.01 of the CBA, which incorporates the Policy, only permits the Company to implement a dress code "consistent with State and Federal laws." (ALJ

D. p. 10) As such, the CBA and Policy provisions at issue expressly *preclude* the Respondent from implementing any dress policy in a manner which impedes upon the federally protected rights of Premises Technicians, which include Section 7 activity. Hence, the ALJ applied the correct standard and arrived at the correct conclusion.

3. *The Parties' Conduct Does Not Evidence Any Waiver of Section 7 Rights.*

The ALJ correctly concluded that the parties' conduct since April 2016--when the Employer implemented the Policy at issue--did not support a finding of waiver.

First, the Policy at issue was amended to remove specific exemplars, including "buttons." Specifically, the predecessor policy stated in pertinent part: "The branded apparel may not be altered in any way which includes adding buttons, pins, stickers, writing etc." (*See* R. Brief p. 5) The Policy at issue was amended so to state, "The branded apparel may not be altered in any way." (*Id*.) Thus, the prohibition of buttons was completely deleted from the Policy by the Respondent.

The amended version was forwarded to the Union on or about April 8, 2016. (R. Ex. 2) Respondent claims it invited bargaining in being receptive to questions, and the Union's lack of questions constituted a waiver of its right to bargain. With respect to the former argument, the ALJ correctly concluded that Respondent's conduct did not "indicate openness to bargain." (ALJ D. p. 9) With respect to the latter argument, even if bargaining was invited, a waiver of the Union's right to bargain cannot be presumed from a mere absence of questions. *NLRB v. Lion Oil Co*., 352 U.S. 282 (1956) (waiver of the right to strike may not be inferred).

Here, the Union reasonably believed the amendments to the Policy, which deleted exemplars, including buttons, would have no preclusive effect on Premises Technicians' statutorily protected right to don union insignia. In the most basic instance, this is evidenced by

the Union's conduct in purchasing the buttons and distributing them to Premises Technicians. (TR 122-24) More substantively, however, Respondent deleted any mention of "buttons" from the Policy. Hence, it was reasonable for the Union to conclude that the Premises Technicians' wearing of buttons containing union insignia would *not* be prohibited in any manner. Further, as has been noted, Appendix F, Section 5.01 of the CBA, which incorporates the Policy, only permitted the Company to implement a dress code "consistent with State and Federal laws," which includes the Act. (ALJ D. p. 10) Again, on these facts, it was reasonable for the Union to conclude that the Policy would not be enforced in a manner that would deprive Premises Technicians of their Section 7 rights.

Despite the Respondent's contentions, in the abstract it cannot be an absolute that an absence of questions about a particular employer action presupposes a waiver of a union's right to bargain, especially with respect to federally protected rights. As to the material facts of this case, there is absolutely no evidence the Union waived its right to bargain in any manner.

D. The Collateral Estoppel Doctrine Does Not Apply to this Case.

"Conventionally defined, the [collateral estoppel] doctrine provides that 'an existing *final* judgment rendered upon the *merits*, without fraud or collusion, by a court of *competent* jurisdiction, is conclusive of *causes of action* and of *facts or issues* thereby litigated, as to the *parties* and their *privies*, in all *other actions* in the *same* or *any other* judicial tribunal of *concurrent* jurisdiction.'" (emphasis original) *See Bay Area Sealers*, 251 NLRB 89 (1980) (ALJ decision containing lengthy discussion of collateral estoppel in the context of Board proceedings and citing 46 Am. Jur. 2d 558, "Judgments," section 394 ff.) "It can be applied if (1) the identical issue was decided in a prior adjudication; (2) there was a final judgment on the merits; (3) the party against whom the bar is asserted was a party or in privity with a party to the

prior adjudication; and (4) the party against whom the bar is asserted had a full and fair opportunity to litigate the issue in question." *Evans Sheet Metal*, 337 NLRB 1200, 1220 (2002).

Respondent cites a decision rendered in *Wisconsin Bell, Inc*., No. 18-CA-147635, *et al*. 2016 NLRB LEXIS 621 (NLRB Aug. 24, 2016) in support of its collateral estoppel argument. That matter, however, involved entirely different parties and facts, and cannot operate as a bar to the instant litigation.

As to the parties, *Wisconsin Bell, Inc*. is a different corporate entity as compared with *Indiana Bell, Inc*. Other than being described as a "sister company and co-party to the CBA," Respondent has not demonstrated that Indiana Bell is a party in privity with Wisconsin Bell. (R. Brief p. 32) Further, Communications Workers of America, Local 4622 and Communications Workers of America, Local 4900 are entirely distinct labor associations. While both are affiliated with the Communications Workers of America, their overlap ends there. As a few examples, both entities have their own leaders elected by their respective memberships; both have separate decision making hierarchies and bodies; and both have separate treasuries. Respondent has failed to demonstrate any overlapping interests that would place CWA Local 4900 in privity with CWA Local 4622 for purposes of collateral estoppel.

Additionally, the facts of the two matters are entirely distinct. As an example, in *Wisconsin Bell* the button at issue and the dispute were described in the following manner:

> The button here again includes the phrase "Where's the Fairness," the same innocuous interpretation of "WTF." When compared to the *Pacific Bell*[4] button, that phrase is printed in a smaller font at the bottom of the button, rather than underneath "WTF." Nonetheless, the text remains legible and clearly visible to anyone who observes the button. A residential customer opening the front door to greet a technician, as would be expected upon initial contact, could read all the

[4] *Pacific Bell Telephone Co.*, 362 NLRB No. 105 slip op. (2015), involved yet another violation of employees' rights to don union insignia. In that case, Pacific Bell and Nevada Bell, presumably "sister Companies" of Respondent, were found to have violated the Act by unlawfully restricting employees from wearing a union button stating "WTF Where's the Fairness," and rejected respondents' special circumstances defenses.

> text on the button. Moreover, the inclusion of the Union's name and the dollar sign in "AT$T" adds additional meaning to "Where's the Fairness." The text conveys that the button's message relates to a labor dispute. The Respondent argues, in conclusory fashion, that the use of the "$" symbol in AT&T impugns the Company's business practices.

Wisconsin Bell, Inc., No. 18-CA-147635, et al. 2016 NLRB LEXIS 506, *1, *39 (NLRB Div. of Judges, July 12, 2016). As a few other examples, the policy at issue in *Wisconsin Bell* is distinct from the Policy in this matter and was enforced against a wider swath of employee job titles beyond Premises Technicians between 2014 and 2015. Additionally, the respondent in *Wisconsin Bell* argued primarily that the button at issue contained vulgarity. *Id*. at *1, *36.Thus, even a cursory reading of the *Wisconsin Bell* decision reveals that the facts have no preclusive effect on the instant case.

Further, the Board's Order adopting the ALJ's decision explicitly contains the following notice: "This unpublished decision is not intended or appropriate for publication and is not binding precedent, except with respect to the parties in the specific case." *Wisconsin Bell, Inc*., 2016 NLRB LEXIS 621, *supra*.

As such, the parties and facts as between *Wisconsin Bell* and the instant matter are entirely distinct and the Respondent has failed to set forth any arguments justifying the application of collateral estoppel to the instant case. Further, the decision cited by the Respondent is explicitly inapplicable beyond "the parties in the specific case." *Id*.

IV. CONCLUSION

For the foregoing reasons, the Decision of the ALJ should be upheld in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to the Board's Rules and Regulations the undersigned hereby certifies that a copy of the foregoing was filed electronically with the Board on October 28, 2019. A copy of the same was submitted to the following individuals via email on the same day.

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